Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20550/2016
HU/20554/2016
HU/20560/2016
HU/20565/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29th March 2019

Decision Promulgated
On 2 April 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

OLALEKAN [B]
ATINUKE [B]
[O A B]
[O B]
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr N Ahmed, Counsel, instructed by Peer and Co. (Birmingham)
For the respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

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1. The 1st 2 appellants are husband and wife. The 3rd and 4th appellants are their daughters, born on 6 April 2010 and 24 July 2012. All are nationals of Nigeria.

2. The 1st appellant came to the United Kingdom on 10 July 2007 with leave as a student. His wife joined him on 19 March 2009. Their children were born in the United Kingdom. On various occasions he extended his leave on as a student until May 2016. On 4 May 2016 he made an in time application for leave to remain on the basis of family and private life. It also expressed the fear that his daughters would be subjected to female genital mutilation if they had to return to Nigeria.

3. His application was refused on 17 August 2016.In terms of appendix FM he could not meet the eligibility requirements in relation to his children because of his immigration status. In terms of his private life he had not been here the necessary 20 years under paragraph 276 ADE(vi) and the respondent did not see any significant obstacles to his reintegration. Similar considerations were advanced in respect of his wife's application. The children's applications failed on the basis of eligibility relating to their parents immigration status. No exceptional circumstances were identified.

4. The appeal was heard by first-tier Tribunal judge Grimmett at Birmingham on 12 December 2017. In a decision promulgated on 9 January 2018 the appeals were dismissed. The judge dealt with the suggestion of a risk from FGM and concluded there would be adequate protection against this in Nigeria. In terms of family and private life the judge acknowledged the length of time the family had been here but made the point that their parents entry to the United Kingdom had been on a temporary footing. The judge felt the children could continue their education in Nigeria and that would be reasonable for them to leave. Reference was made in a general sense to section 117 with the comment being that their leave had been precarious.

The Upper Tribunal

5. Permission to appeal was granted on the basis there was a failure to consider whether the 1st appellant met paragraph 276 B,10 years lawful residence, at the date of hearing. It was also arguable that the judge failed to have regard to the respondent's published position and the guidance given by the Court of Appeal in MA (Pakistan) & Ors, R (on the application of) [2016] EWA Civ 705. The Court of Appeal there indicated that for a child to have resided in the United Kingdom for 7 years represented a factor of some weight, leaning in favour of leave to remain being

granted. The report referred to the need for strong reasons for refusing leave in such cases. After 7 years the child will have put down roots and developed social, cultural and educational links and it was likely to be highly disruptive if they are required to leave.it was pointed out there was no reference to section 117 B(6) by the judge.

6. The appellant's representative made the point that the 1st appellant's leave expired on 5 May 2016 and an application for further leave to remain was made on 4 May 2016. He suggested therefore that the 1st appellant and now been in the United Kingdom in excess of 10 years with leave. The presenting officer acknowledged that the reference to the families presence being precarious as not adequately reflect the fact that they were always here lawfully.

7. The presenting officer accepted that there was force in the points made. The reference to the family's permission to be here being precarious was perhaps misleading in that they were always here lawfully. In the circumstances he was prepared to concede there was a material error of law in the decision.

8. In the absence of a significant factual dispute the parties were in agreement to my remaking the decision.

9. It is accepted that the 1st appellant has been here lawfully. This continued to be the position after his leave expired and pending the final determination of his subsequent application. On this basis I find he now satisfies the 10 year lawful residence requirements. I am obliged to the appellant's representative for providing me with the decision of OA and others(human rights; 'new matter'; section 120 Nigeria [2019]UK 65.In the present instance ,if a fresh application were made on this ground I can see no reason in terms of lawful residence why it would not succeed.

10. In relation to his children further guidance has now been given in the decision of KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53. This was published after the impugned decision but nevertheless the law must be applied as it is now understood. The respondent's published guidance on this issue has been amended in light of this decision. In the circumstance it would not be reasonable to expect them to leave. Consequently, this is an additional ground in support of allowing the appeal.

11. On the basis of what has been agreed between the parties no further written reasons are required. The requirements of subparagraph 40(3)(a) and (b) of the Upper Tribunal procedural

rules are met. I therefore set aside the decision of the First-tier Tribunal and remake it, allowing the appeals.

Decision.

The decision of First-tier Tribunal Judge Grimmett materially errs in law and is set aside. I remake the decision allowing the appeals under article 8.

Francis J Farrelly
Deputy Upper Tribunal Judge.

29th March 2019